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No. 94-1380

In The

# Supreme Court of the United States

October Term, 1994

AJ & AJ SERVICING, INCORPORATED, and ROBERT JACOBS,

*Petitioners,*

v.

TUDOR ASSOCIATES, LTD., II, and JOSEPH N. CALLAWAY, TRUSTEE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED
**(Restated)**

1. Whether the United States Court of Appeals abused its discretion by simply reversing the district judge's order awarding a new trial on punitive damages without expressly evaluating the excessiveness of the award, and without remanding to the district judge to do so where, (a) the district judge ordered a new trial because of his personal bias against awarding punitive damages to private plaintiffs not because he believed the award excessive, (b) the defendants chose neither to submit instructions bearing on excessiveness nor litigate the issue of excessiveness in their new trial motion or on appeal and, (c) the modest 1:7 ratio between compensatory and punitive damages and, to use the court of appeals' phrase, "the [defendants'] reprehensible fraudulent conduct," made the punitive damages award a reasonable one.

2. Whether this Court should grant certiorari on the issue of excessiveness of punitive damages where the petitioners concede they did not raise that issue in the court of appeals, and where petitioners invited error when they refused to allow the jury, and the district judge on post-verdict motions, to consider the criteria of excessiveness they now claim are applicable.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondents adopt petitioners' citation and add:

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Tudor Associates, Ltd., II, and Joseph N. Callaway, Trustee, respectfully request that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed by petitioners AJ & AJ Servicing, Inc., and Robert Jacobs (collectively "AJ"), be denied.

## STATEMENT OF THE CASE

### 1. The Factual Findings Underlying The Punitive Damages Award

AJ's sanitized version of its conduct, set forth in the Petition at 4-6, is belied by the jury's findings against it. By interrogatory verdict, the jury found that AJ breached its contract with Tudor, breached a fiduciary duty to Tudor, violated North Carolina's unfair and deceptive trade practices act, and converted monies to which Tudor was entitled "with gross, willful, reckless or wanton disregard for [Tudor's] rights. . . . " In addition, the jury found that AJ: attempted to conceal revenues to which Tudor was entitled by secreting them in unrelated bank accounts, filed "false and deceptive reports" with the bankruptcy court, "misrepresent[ed] to the bankruptcy trustee" the trustee's right to revenues, "misled and deceived" Tudor regarding how revenues were being used, "conceal[ed]" from Tudor the identity and ownership of entities receiving certain fees, "falsely" represented to Tudor that certain payments were related to the property and "falsely" represented to Tudor that certain fees AJ paid to itself had been approved by the property owners (Brief Opp. App. A-9–A-13).

The trial judge granted AJ's renewed motion for judgment as a matter of law on the conversion, breach of fiduciary duty and unfair trade counts, finding various legal infirmities in Tudor's proofs (Pet. App. 29a-35a). By refusing, however, to grant AJ's alternative motion for new trial on these causes of action (Pet. App. 38a), the judge implicitly concluded that each of the jury's factual

findings underlying its $7 million punitive damages verdict was supported by the greater weight of the evidence.

**2. The Trial Judge's Dislike For The Punitive Damages Award**

The trial judge granted AJ's motion for a new trial on punitive damages stating that his "constitutional sensibilities" had been "severely jarred" by the punitive damages verdict (Pet. App. 38a-39a). He conceded that while the United States Supreme Court had been invited on several occasions to declare punitive damages unconstitutional, it had not done so. "[I]n most instances," the trial judge asserted, the Supreme Court has simply "mounted a constitutional horse and ridden off in all directions." (Pet. App. 39a).

The trial judge thereupon set out to justify his award of a new trial on punitive damages. First, he determined that a new trial was required under *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). *Mattison*, applying *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), found South Carolina's punitive damages scheme unconstitutional because a jury instructed under South Carolina law was permitted to award any amount it felt was appropriate to punish and deter. Moreover, because South Carolina law provided no guidance to the jury, "a reviewing court could not rationally decide that the amount was excessive without simply substituting its notion of excessiveness for that of the jury." (Pet.App. 43a, *quoting*, 947 F.2d at 105). The trial judge believed that he had failed to instruct the jury properly under *Haslip*

and *Mattison* and characterized his failure, notwithstanding AJ's refusal to submit an appropriate instruction and its objections to Tudor's *Haslip* and *Mattison* instruction, as "plain error." (Pet. App. 43a).

AJ's position throughout this litigation, first articulated in its interlocutory Motion for Judgment As a Matter of Law with respect to punitive damages (R. 150), and repeated in its objections to Tudor's proposed jury instructions, in its post-trial motions under Fed.R.Civ.P. 50 and 59, in its briefs to the Fourth Circuit Court of Appeals, and in its petition for rehearing to that Court, was that North Carolina's entire punitive damages scheme was unconstitutional. AJ repeatedly argued that no jury instruction or post-verdict review criteria could be formulated, and no appellate oversight by the Fourth Circuit Court of Appeals could be afforded, that would meaningfully limit the size of any punitive damages award in North Carolina (Transcript, June 22, 1993, 38, 39, 40, 42-43, 47, 48, 49, 50, 54). AJ's entire trial and post-trial strategy was summed up in its counsel's assertion: "I don't think we can have punitive damages in North Carolina right now." (Pet. 11 & n. 2; Pet. App. 22a, 44a; Transcript, June 22, 1993, 50).

The judge next sought to justify a new trial on punitive damages by asserting that "the Fifth Amendment forbids putting a defendant twice in jeopardy for the same offense," and that AJ had already suffered a $350,000.00 punitive damages judgment in state court on the identical facts.[1] Reasoning that "the basis of plaintiff's

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[1] The parties in the state court action were not identical to the parties in the federal action. Although AJ was a defendant in

claim for punitive damages was [AJ's] criminal conduct" (Pet. App. 47a), the judge concluded that AJ could not "be liable for punitive damages in another action involving the same conduct." (Pet. App. 45a-46a).

Finally, again analogizing punitive damages to a criminal sanction, the judge declared punitive damages to be "morally wrong" because those damages "go not into the public coffers as do all other fines and forfeitures but into the pockets of the successful plaintiff and his attorney." (Pet. App. 46a). Given "the sometimes bewildering decisions" and "the confused state of the law in the area of punitive damages," the trial judge believed that private plaintiffs and their attorneys would continue to be, in effect, unjustly enriched "until Congress, the state legislature, or both, step in and enact corrective legislation." (Pet. App. 47a-48a).

The trial judge concluded his opinion by stating that if he were "writing on a clean slate [he would] have no hesitance in ruling unconstitutional the award of punitive damages . . . and would simply enter judgment for the defendants on this issue." Because he could not simply rule, as he would have liked, that Tudor's award was "unconstitutional" he conceded that he was forced, instead, to state ("Instead, the court must state. . . . "),

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both actions, five of its state co-defendants were not parties to the federal action. Nor were the four plaintiffs in the state action parties to the federal action. Moreover, the causes of action and remedies sought by the state court plaintiffs differed from the causes of action and remedies sought by the federal plaintiffs.

that the award "was shocking to the court's conscience . . . grossly excessive and contrary to the weight of the evidence." (Pet. App. 48a).

### 3. The Circuit Court's Rejection Of The Trial Judge's Reasoning

#### A. The State Law Causes of Action

The court of appeals reversed virtually every one of the trial judge's rulings on Tudor's state-law causes of action. The court found that the judge had "incorrectly applied res judicata" (Pet. App. 7a), that his reasons for finding certain of Tudor's claims time-barred were "unconvincing" (Pet. App. 9a), that his reasoning was "err[oneous]" and "inapposite" on the conversion issue (Pet. App. 12a, 13a), that his decisions on Tudor's unfair and deceptive trade practices claim were without a "basis in the record" and an "abuse[ ] of discretion" (Pet. App. 15a), and that he had "wrong[ly]" used a new trial standard to render judgment as a matter of law on Tudor's fiduciary duty claim (Pet. App. 16a).

#### B. Punitive Damages

The court of appeals also rejected each of the trial judge's reasons for ordering a new trial on punitive damages. First, contrary to AJ's assertion at 7, the court of appeals did not find that AJ simply had "waived" the issue of proper jury instructions. What the court of appeals stated was that "The conduct of the defense in this case presents a clear example of invited error. . . . AJ cannot argue against the proper instruction at trial and

then argue to set aside the award because the proper instruction was not given." (Pet. App. 20a). AJ opposed Tudor's punitive damages instruction on the grounds that the instruction had not yet been approved by the North Carolina Supreme Court. However, as the court of appeals stated, under *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417 (4th Cir. 1992), the trial judge was still required to predict what punitive damages instruction the North Carolina Supreme Court would adopt in light of *Haslip* (Pet. App. 19a-20a). The judge's inquiry "would have been well-informed" by Tudor's *Haslip* instruction, the court of appeals suggested, had AJ not convinced the judge to reject it (Pet. App. 20a).

The court of appeals then quoted the trial judge's remaining justifications for granting a new trial: that the punitive damages award constituted double jeopardy, that payment of punitive damages to a private plaintiff and his attorneys was "morally wrong," that the decisions on punitive damages were "bewildering," and that if his theories of punitive damages were the law he would enter judgment for AJ but, because they were not, he had to "[i]nstead" label the award shocking, excessive and contrary to the weight of the evidence (Pet. App. 21a-22a). These assertions, the court of appeals concluded, demonstrated the trial judge's "admitted prejudice against punitive damages for any private plaintiff" and made it "unlikely that the court actually weighed competing interests" in setting aside the punitive damages award (Pet. App. 22a).

### C. The Court Of Appeals' Understanding Of The Facts Supporting Punitive Damages

Throughout its opinion, the court of appeals demonstrated its awareness of the underlying facts and of the jury's reasons for imposing punitive damages. In affirming the trial judge's grant of summary judgment against Tudor on its RICO claim because Tudor could not prove multiple predicate acts of racketeering, the court of appeals stated:

> AJ's reprehensible fraudulent conduct amounted to a single scheme to defraud Tudor of money due under the mortgages. Despite the fact that the scheme lasted over ten years and involved millions of dollars, it nevertheless involved a single scheme to inflict a single injury on a single victim.

(Pet. App. 11a).

Reversing the judgment as a matter of law on conversion, the court of appeals stated that "There was substantial evidence that AJ's fraudulent conduct converted Tudor's property to its own benefit." (Pet. App. 12a). The court quoted in full the trial judge's paraphrase of the jury's findings on AJ's fraudulent and deceptive acts, and his concession that these acts constituted deceptive and unfair trade practices under North Carolina law. Disagreeing with the trial judge's conclusion that these acts merely amounted to "a simple breach of contract," the court of appeals stated, "It is difficult to imagine a more clear finding by the jury of substantial aggravating factors." (Pet. App. 14a, 15a). Rejecting the trial judge's conclusion that Tudor did not rely on AJ because Tudor "was aware that AJ was involved in deceptive acts," the

court of appeals found that simply because "Tudor knew of AJ's deception does not make it any less deceptive or unfair."(Pet. App. 16a).

## REASONS FOR DENYING THE WRIT

### 1. AJ Has Not Preserved The Issue Of The Size Of The Award For Review

AJ admits that it "did not challenge the *size* of the punitive damage award" on appeal, or in the district court (Pet. 11 & n. 2). Yet, AJ petitions this Court to remand the case to the court of appeals to review the size of the award. Absent "exceptional circumstances," which certainly are not present here, this Court has traditionally refused to address claims that were not presented below. *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599,1605 n. 5 (1994); *Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (The Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

AJ offers two insufficient excuses for its failure to preserve the issue on which it seeks review. First, AJ says that it had "no reason to anticipate that if the court of appeals reversed the trial court, it would simply reinstate the award with no further assessment of the issue." (Pet. 11 n. 2). AJ, however, should have known of Fed.R.Civ.P. 50(c)(1), and of the fact that, given the idiosyncratic nature of the trial judge's decision and its own invited

error on the jury instruction issue, a simple reversal without remand was possible, if not likely. *See, e.g., Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (When a judgment is reversed under Rule 50(c)(1), "it is within the appellate court's discretion to determine whether the case should be sent back for a new trial."); *Equal Employment Opportunity Comm'n v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991) (A remand should not be ordered where it would give a litigant "two bites of the apple").

Moreover, assuming AJ had no reason to anticipate a reversal without remand during briefing, AJ obviously knew that no remand had been ordered after it read the court of appeals' decision. Yet, in its "Petition for Rehearing And, Alternatively, Suggestion For Rehearing *En Banc*" to the court of appeals, AJ again failed to ask the court to scrutinize the size of the award or to remand that issue for determination in the district court.

Secondly, AJ claims that it had no obligation to argue to the court of appeals that the award was excessive where Tudor never argued the contrary position on appeal. Tudor, however, had no reason to discuss the size of the punitive damages award on appeal because the trial judge, as a direct result of AJ's trial tactics, never specifically addressed that issue in his order granting a new trial. AJ, furthermore, overlooks the fact that it, too, was an appellant before the court of appeals by virtue of its cross-appeal. In its point on cross-appeal, however, AJ failed to argue that if the punitive damages award were to be reinstated, the court of appeals first had to review its size.

**2. By Its Trial Strategies, AJ Prevented The District Court And The Court of Appeals From Reviewing The Size Of The Award**

The three entities responsible for determining whether a punitive damages award is excessive – jury, trial judge, appellate court – are integrated parts of a procedural whole. The jury in a diversity case must be instructed using state-law criteria that reasonably inform its discretion, *Haslip*, 499 U.S. at 19, 20; the trial judge on a defendant's Rule 59 motion determines, by reference to the same criteria, whether the jury was properly instructed and whether the punitive damages award was excessive, *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-280 (1989); and the appellate court, again by reference to the same criteria, reviews the district court's determinations under an abuse of discretion standard. *Id.*

Nothing in this calculus required the court of appeals, or the trial judge for that matter, to independently scrutinize the size of the award or apply detailed *Haslip* post-verdict review criteria where AJ: (1) refused to submit any punitive damages instruction of its own, (2) convinced the trial judge not to give the thorough and detailed punitive damages instruction submitted by Tudor, (3) failed to argue any punitive damages criteria or address the amount of punitive damages in its closing

argument,[2] (4) in its Rule 59 motion, failed to provide the trial judge with any punitive damages criteria to apply on post-verdict review, (5) argued at every stage of the proceedings that it was not possible to formulate constitutional jury instructions under North Carolina law, (6) argued at every stage of the proceedings that it was not possible for the trial judge and the court of appeals to engage in meaningful post-verdict review of the jury's punitive damages award under North Carolina law and, (7) failed to seek review of the size of the award in the court of appeals.

AJ's adamant and unrelenting assertion throughout every prior phase of this case that nothing the jury or the trial judge could do would pass constitutional muster under *Mattison* and *Haslip* thus precludes certiorari for two reasons. First, AJ left no review function for the court of appeals to perform under *Browning-Ferris* and *Haslip* after insisting that all punitive damages were unconstitutional in North Carolina and after preventing Tudor's proposed *Haslip* instruction from being read to the jury and the criteria in that instruction – or indeed *any* criteria of excessiveness – from being considered by the trial judge on post-verdict review. AJ certainly cannot ask this Court to order the court of appeals to review the size of the punitive damages award using the same criteria that AJ argued were inapplicable and unconstitutional.

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[2] AJ's only arguments to the jury directed to the imposition of a punitive damages award or its size, consisted of its counsel's assertions that there was no "need for further deterrence or punishment," and that AJ had been punished "enough" simply by having been a party to the litigation (Transcript, June 23, 1993, 29-34).

Secondly, given the success of AJ's efforts in keeping North Carolina's proposed post-*Haslip* punitive damages criteria from being read to the jury and in preventing their consideration by the trial judge on post-verdict review, the court of appeals could not remand, and this Court cannot either, without rewarding AJ for its sabotage of the tripartite *Haslip* process. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (There are strong prudential objections to reversing a judgment because of instructional errors that the petitioner invited). Any remand by this Court, or by the court of appeals, would necessarily require a lower court to consider the same North Carolina post-*Haslip* punitive damages instruction which Tudor submitted and against which AJ successfully argued. The consequence of AJ's trial and appellate strategy of flatly denying the relevance and constitutionality of *any* possible formulation of North Carolina's post-*Haslip* law of punitive damages is clear: AJ waived all appellate relief based on the failure of the trial judge and the court of appeals to engage in an excessiveness review applying North Carolina law and the criteria in North Carolina's post-*Haslip* punitive damages instruction.

### 3. The Court Of Appeals Did Not Abuse Its Discretion By Reversing Without Remand Where It Could Determine From The Trial Judge's Opinion And The Record That The Judge Was Not Offended By The Size Of The Award

The court of appeals did not, at least explicitly, apply *Haslip* criteria to this case. However, the court of appeals' identification of these criteria (Pet. App. 19a), and its

treatment of the facts, strongly suggest that it considered the "overall circumstances" of the case, *Winant v. Bostic*, 5 F.3d 767, 775 (4th Cir. 1993), citing *Haslip*, 499 U.S. at 12-20, and was not at all perturbed by the size of the punitive damages award.

To begin with, the court of appeals knew that the size of the award was not what had offended the trial judge's "constitutional sensibilities." By denying AJ's motion for new trial on every one of the intentional tort, deceit and misrepresentation findings, the trial judge necessarily agreed that the jury's award of punitive damages was supported by the clear weight of the evidence.[3]

Nor was the trial judge's disagreement with the award, as the court of appeals could see, premised on the absence of evidence of reprehensible wrongdoing by AJ. Indeed, the trial judge strongly believed that the punitive damages award against AJ was proper. In a statement that could only be referring to AJ the trial judge said: "This court readily agrees that egregious violations of ethical business standards by unscrupulous businessmen should be punished, and that such punishment should be so substantial as to serve as a deterrent to others who would engage in such forbidden conduct." (Pet. App. 45a). The basis of Tudor's claim and the jury's findings against AJ, the trial judge acknowledged, "was criminal

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[3] Indeed, the trial judge conceded, even as he refused to give North Carolina's proposed post-*Haslip* instruction that Tudor requested, that eleven of the twelve criteria for punitive damages contained in that instruction were arguably relevant to AJ (Transcript, June 22, 1993, 48).

conduct which violated the rights of the general public as well as those of the plaintiff." (Pet. App. 47a).

By also asserting that it was "morally wrong" for a punitive damages award to go "into the pockets of the successful plaintiff and his attorney" rather than "into the public coffers." (Pet. App. 46a-47a), the trial judge again signalled to the court of appeals that he was not offended by the size of the punitive damages award but by the fact it would be paid to private parties (Pet. App. 47a). Thus, the court of appeals accurately perceived that what had motivated the judge to vacate the punitive damages award was not the amount of the award or its imposition on AJ, but the fact that North Carolina would not enjoy the award and that AJ, whom the judge analogized to a criminal, had not received the double jeopardy safeguards afforded criminals (Pet.App. 45a-46a).[4]

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[4] The trial judge's belief that AJ's double jeopardy rights were violated by successive state and federal punitive damages awards is incorrect. *See Browning-Ferris*, 492 U.S. at 276, n. 21, *quoting United States v. Halper*, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties."). AJ, moreover, waived the right to complain about this issue. Prior punishment was a factor bearing on the size of the award contained within the North Carolina *Haslip* instruction which Tudor requested and AJ opposed (Brief Opp. App. A-6, 7). AJ, furthermore, never argued the issue of prior punishment to the jury or raised that issue in its Rule 50/59 motion, or on appeal. *See Dunn v. Hovic*, 1 F.3d 1371, 1384 (3d Cir. 1993). ("OCF made the strategic decision not to introduce into evidence before the jury information concerning other punitive damages awards assessed against it. Had it done so, the jury might have made a smaller award."), *cert. denied sub nom., Owens-Corning Fiberglas Corp. v. Dunn*, 114 S.Ct. 650 (1993).

The concluding language of the trial judge's memorandum decision once again confirmed to the court of appeals the judge's lack of concern over the amount of the punitive damages award. Undoubtedly aware that he had not properly exercised his Rule 59 discretion by his reliance on the Double Jeopardy Clause and his personal beliefs that payment of punitive damages to private litigants was "morally wrong," the trial judge said something extremely revealing: since he could not invalidate the punitive damages award for the extra-judicial reasons that disturbed him, he was forced to couch his highly subjective reasons for disliking the award in the boilerplate language of Rule 59 (Pet. App. 48a).

The court of appeals, again, thoroughly understood what the trial judge was doing and saying. The pointed manner in which the court of appeals reversed virtually every one of the judge's rulings reflected its understanding that the trial judge had no legitimate Rule 50 or 59 objections to the size of the punitive damages award. The court of appeals communicated its own sense that the punitive damages award was not excessive by its observations that "AJ's reprehensible fraudulent conduct" lasted "over ten years and involved millions of dollars" (Pet. App. 11a); that "AJ's fraudulent conduct converted Tudor's property" (Pet. App. 12a); that it was "difficult to imagine a more clear finding by the jury of substantial aggravating factors" (Pet. App. 15a); and that AJ had committed "deceptive" and "unfair" acts. (Pet. App. 16a).

The court of appeals would also have understood, having just decided *Winant v. Bostic, supra*, a fraud, deceptive trade practices, breach of contract and punitive damages case arising under North Carolina law, that

while a more detailed *Haslip*-type instruction might have provided the jury with greater guidance, there was nothing inherently unconstitutional in the instruction the district judge gave.[5] Indeed the instruction in this case is essentially the same one that *Haslip* found "reasonably accommodated [the defendant's] interest in rational decision making." 499 U.S. at 6 n. 1, 19, & 20. The court of appeals could well have concluded that since the instruction met *Haslip*'s minimum standards of reasonableness ("deterrence and retribution . . . 'tak[ing] into consideration the character and degree of the wrong', " 499 U.S. at 19), and since AJ's behavior was "reprehensible," of long duration, and the cause of millions in losses to Tudor, that the "overall circumstances" of the case, in light of *Haslip*,

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[5] The court of appeals knew, too, that although the trial judge, at AJ's insistence, had not read Tudor's *Haslip* instruction to the jury, he had nevertheless allowed Tudor's counsel both to argue the criteria in that instruction to the jury in closing and to tell the jury that the criteria came from a "North Carolina Model Jury Instruction" (Transcript, June 23, 1993, 15; Pet.App. 44a). Tudor's counsel told the jury that his client had no automatic right to punitive damages, that any award had to "bear a rational relationship" to the sum needed to punish and deter AJ, and that, in determining the amount of punitive damages, the jury should consider: the damages Tudor suffered, the "reprehensibility" of AJ's conduct, the 13-year duration of that conduct, AJ's awareness of its actions and their consequences, AJ's prior acts of wrongdoing, AJ's acts of concealment, how AJ profited from its actions, and AJ's financial status (Transcript June 23, 1993, 8-19, 21). *Compare, TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 2739 (1993) (O'Connor, J., dissenting) ("Over and over respondents' lawyers reminded the jury that there were virtually no substantive limits on its discretion.").

justified the amount of the award. *Winant v. Bostic*, 5 F.3d at 775.[6]

### 4. The Court of Appeals Did Not Abuse Its Discretion By Reversing without Remand where AJ's Invited Error And The Trial Judge's Bias Against Punitive Damages Made An Effective Remand Impossible

The court of appeals accurately perceived the trial judge's treatment of the punitive damages issue for what

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[6] The ratio of compensatory to punitive damages in this case was not unreasonable under North Carolina law. The compensatory damages award of $529,696.50 (Brief Opp. App. A-14), prejudgment interest, and the approximately $500,000 in additional escrow monies the award entitled Tudor to withdraw, made the ratio of compensatory to punitive damages less than 1:7. This ratio compares favorably to ratios in other North Carolina punitive damages cases. *See, e.g., Ford v. McAnally*, 182 N.C. 419, 109 S.E. 91 (1921) (1:122); *Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934) (1:9); *Mapp v. Toyota World, Inc.*, 81 N.C.App. 421, 344 S.E. 2d 297 (N.C. Ct. App. 1986) (1:13); *Stone v. Martin*, 85 N.C. App. 410, 355 S.E. 2d 255 (N.C. Ct. App. 1987), *rev. denied*, 320 N.C. 638, 360 S.E. 2d 105 (1987) (1:8); *Maintenance Equip. Co. v. Godley Builders*, 107 N.C.App. 343, 420 S.E.2d 199, 205 (N.C.Ct.App. 1992), *rev. denied*, 333 N.C. 345, 426 S.E.2d 707 (1993) (1:38); *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 424 S.E.2d 181, 187 (N.C. Ct. App. 1993), *aff'd*, 334 N.C. 652, 435 S.E.2d 71 (1993) (1:112). *See, also, TXO Production* (1:526); *Browning-Ferris* (1:117).

Relevant too, in assessing the size and reasonableness of the punitive damages award, is the fact that had Tudor elected to receive treble *compensatory* damages under the statutory unfair trade act count instead of punitive damages under the common law intentional tort counts – an election AJ would not have protested – Tudor would have been entitled to approximately $3 million on that cause of action alone (Brief Opp. App. A-16; R. 154).

it was and for what the trial judge essentially conceded it to be – a highly personal, extra-judicial response to the idea of a private plaintiff and his attorney, rather than the state, enjoying the benefits of a punitive damages award. The court of appeals was not required to accept the trial judge's rote invocation of Rule 59's catch-phrases, *e.g.*, "grossly excessive," "shocking to the court's conscience," where the judge's resort to those phrases was clearly pretextual. *Cf. Bowen v. American Hospital Ass'n*, 476 U.S. 610, 626 n. 11 (1986) ("[G]reat weight" must be given to the court of appeals' interpretation of the trial judge's opinion).

The court of appeals' citation to *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cir. 1985), as a basis for its decision to reverse without remand, also reflected its understanding of the trial judge's true motivations. *Goldsmith* held that the trial judge abused his discretion in ordering a new trial because one error on which he had based his ruling was "invited," and his "abbreviated treatment" of the weight of the evidence issue did "not demonstrate that [he had] engaged in an appropriate balancing" or had applied the test for awarding a new trial based on the weight of the evidence "in any meaningful way." *Id.* at 416. *Goldsmith*, like the court of appeals below, reversed and simply reinstated the jury verdict. Where, as here and, apparently, in *Goldsmith*, a court of appeals lacks "a perfect confidence in [the] district court's capacity and willingness to engage in a true reconsideration that accepts and takes into account" all relevant decisional factors, it is not required to remand to that judge. *James v. Jacobson*, 6 F.3d 233, 242-243 (4th Cir. 1993).

Coupled with the court of appeals' apparent belief that the trial judge's avowed biases made an effective remand unlikely was the fact that AJ, by its invited errors and waivers, had made a successful remand impossible. No judicial interests would have been served by rewarding AJ for its invited errors and waivers with a new trial. *Cf. City of Springfield*, 480 U.S. at 359 (Imprudent to reverse where the petitioner invited the instructional error). Given the Seventh Amendment's bias in favor of jury findings, and the court of appeals' "inherent power to put an end to civil litigation in the interests of fairness and judicial economy when, by its conduct, one of the parties has, in effect, waived its right to a jury determination," *Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 501,505 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 3038 (1993), the court of appeals did not abuse its considerable discretion in reversing the judgment below without remand.

### 5. Certiorari Should Not Be Granted Based Upon *Honda Motor Co. v. Oberg*, *BMW v. Gore*, Or Any Other Case Cited By AJ Where The Facts and Procedural Postures Of Those Cases Bear No Resemblance To This One

The cases AJ cites in its Petition at 13-17 do not involve invited error, waiver, or the pretextual use of Rule 59 by a district court judge – the dispositive issues before the court of appeals in this case. Nor do any of AJ's cases impose a duty on a court of appeals to independently review the size of a punitive damages award where the defendant did not seek that form of appellate review. Indeed, in one of the cases AJ cites, *Eichenseer v.*

*Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 n. 7, 1384 (5th Cir. 1991), the court of appeals refused to independently decide whether a punitive damages award was excessive where it had not been "requested to do so." There is, in short, no "real and embarrassing conflict of opinion and authority" between the court of appeals' decision in this case – which is based entirely on procedural grounds – and the decisions in the cases cited by AJ. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *Accord Wisconsin Elec. Co. v. Dunmore Co.*, 282 U.S. 813, 813 (1931) ("[T]he asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law.").

*Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994), on which AJ also relies, provides no basis for granting certiorari in this case. *Honda* is a state court case decided under a unique Oregon constitutional provision which barred a trial or appellate judge from reviewing the size of a punitive damages award.

Here, unlike *Honda*, the full panoply of trial and appellate constraints on the size of a punitive damages award was legally available to AJ. AJ simply chose not to invoke those procedures. Instead, AJ tactically prevented the jury and the trial judge from considering the detailed criteria for punitive damages that Tudor had proposed, and then failed to raise the issue of the size of the award in the court of appeals.

AJ's characterization of *BMW of North Amer., Inc. v. Gore*, as the "companion case" of this one (Pet. 13), is inaccurate to say the least. Like *Honda*, *BMW* does not involve the critical issues of invited error and waiver.

*BMW* involves state supreme court review of a trial judge's decision denying a new trial under state law. AJ's case involves court of appeals review under Seventh Amendment constraints of a highly idiosyncratic pretextual order of a trial judge granting a new trial on non-Rule 59 grounds.

*BMW*, moreover, does not involve the type of reprehensible, fraudulent, intentionally tortious conduct involved here. In *BMW*, the defendant imperceptibly touched up the paint on a new BMW without revealing that fact to the purchaser. This seemingly innocuous act resulted in a $4,000.00 compensatory award and a $4 million punitive damages award – a ratio of compensatory to punitive damages of 1:1,000! Punitive damages of $4 million might thus be suspect under *BMW's* facts; but punitive damages are properly awarded, and in significant amounts, in cases of intentional tort, deceit, breach of fiduciary duty, conversion and fraudulent trade practices. *See TXO*, 113 S.Ct. at 2726 (Kennedy, J., concurring) ("This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. . . . [TXO] acted . . . 'through a pattern and practice of fraud, trickery and deceit,' and employed 'unsavory and malicious practices' in the course of its business dealings with respondent."). If the terms conversion, breach of fiduciary duty, and unfair and deceptive trade violations are substituted for "slander of title," Justice Kennedy's description of TXO's conduct also describes AJ's.

## CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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# APPENDIX

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N.C.P.I. – Civil 810.02

**PUNITIVE DAMAGES. – Issue of Whether to Make Award and Amount.**

This issue reads:

"What amount of punitive damages, if any, does the jury in its discretion award to Plaintiff?"

You are to answer this issue only if you have answered issues ___ in favor of Plaintiff.

Whether to award punitive damages is a matter within the sound discretion of the jury. Punitive damages are not awarded for the purpose of compensating the plaintiff for his damage, nor are they awarded as a matter of right. In deciding whether to award punitive damages, you must determine that there is a need to punish any of the defendants for their conduct, or to deter any of the defendants or others from engaging in this or similar conduct in the future, or to make an example out of any of the defendants.

Furthermore, if you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship to the sum reasonably needed to punish any of the defendants for their conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make and [sic] example out of any of the defendants. In determining such amount, you may consider such of the following factors as are supported by the evidence:

(1) The damage which occurred from the defendants' conduct

(2) the damage which could have occurred from the defendants' conduct

(3) the degree of reprehensibility of the defendants' conduct

(4) the duration of the defendants' conduct

(5) the defendants' awareness of the nature and character of his conduct

(6) the defendants' awareness of the probable consequences of his conduct

(7) any concealment by the defendants of the facts or consequences of his conduct

(8) the existence and frequency of any similar past conduct by the defendants

(9) whether or not the defendants profited from their conduct and, if so, whether that profit should be taken away

(10) the financial status or position of the defendants.

You may consider such other factors as arise logically and fairly from the evidence presented.

Finally, if you determine, in your discretion, to award punitive damages, then, considering those factors which are supported by the evidence, you may award to the plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the defendant, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out

of the defendant. That amount should be written in the space provided on the verdict sheet.

If, on the other hand, you determine, in your discretion, not to award the plaintiff any amount, then you should write the word "None" in the space provided on the verdict sheet.

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PUNITIVE DAMAGES. – Issue of Whether to Make Award and Amount. (Special Cases)

*Caveat: As of the publication date of this instruction, there have been no North Carolina appellate decisions dealing directly with the issues raised by Haslip and its progeny. See note 4 below. This instruction should not be used except in those infrequent cases where special evidentiary[1] or procedural[2] considerations make it prudent to do so.*

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[1] N.C.P.I. – Civil 810.01 will suffice in most instances. However, in some special cases (e.g., complex tort litigation), the trial judge may wish to consider a more detailed instruction after implementing special procedural safeguards. For example, one of the parties may seek to introduce evidence which, although probative of a "rational relationship" or "reasonable limits," is nonetheless highly prejudicial to the other party on the liability or compensatory damage issue. The purpose of this instruction is to provide the trial judge with a guide for instructing the jury in such isolated instances.

[2] In cases where punitive damages are sought, the trial court should, as a part of the pretrial process, determine whether any special procedures should be invoked. For example, if a party so requests, and upon a showing of good cause, the trial court, in its discretion, may try the punitive damage

This issue reads:

"What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?"

You are to answer this issue only if you have answered (*identify issues and specify answers necessary for a consideration of this issue*).

Whether to award punitive damages is a matter within the sound discretion of the jury.[3] Punitive damages are not awarded for the purpose of compensating

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issues separately from the liability and compensatory damage issues by bifurcating the trial. N.C.G.S. 1A-1, Rule 42(b) gives the trial court broad discretion to bifurcate a trial, particularly "where separate submission of the issues avoids confusion and promotes a logical presentation to the jury." *In re Will of Hester*, 320 N.C. 738, 743, 360 S.E.2d 801, 804 (1987).

[3] Punitive damages are for the jury to award. *Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226, 230-231, 404 S.E.2d 664, 667 (1991). Neither the trial court nor the appellate courts can substitute their own judgment for that of the jury; however, the courts have historically exercised their inherent power to set aside excessive or disproportionate awards. *Harris v. Queen City Coach Co.*, 220 N.C. 67, 69, 16 S.E.2d 464, 465 (1941). See also, *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 516, 23 S.E.2d 894, 896 (1943). However, in the post-*Haslip* era (see note 4, infra), this standard of review is no longer applicable. The new standard of review applicable to such awards is whether the evidence before the jury permits an inference that a *rational relationship* exists between the amount awarded and the sum reasonably needed to punish the defendant, or to deter the defendant or others from similar conduct or to make an example out of the defendant. In any event, Article I, Section 25 of the North Carolina Constitution in all probability precludes a post-trial review process which considers evidence not put before the jury.

the plaintiff for *his* [injury] [damage], nor are they awarded as a matter of right. In deciding whether to award punitive damages, you must determine that there is a need to punish the defendant for *his* conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant.

Furthermore, if you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship[4] to the sum reasonably needed to punish the defendant for *his* conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant. In determining such amount, you may consider such of the following factors as are supported by the evidence.[5]

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[4] To meet due process requirements, jury discretion must be exercised "within reasonable constraints." *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). North Carolina's law meets this standard. "[I]t has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury *and within reasonable limits . . .* ". *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 725, 73 S.E.2d 785, 787 (1953) (emphasis supplied), *partly overruled on other grounds in Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976); *Blackwood v. Cates*, 297 N.C. 163, 167, 254 S.E.2d 7, 10 (1979) (quoting *Swinton*); *Oestreicher v. American National Stores*, 290 N.C. 118, 133, 225 S.E.2d 797, 807 (1976) (quoting *Swinton*); *Baker v. Winslow*, 184 N.C. 1, 5, 113 S.E. 570, 572 (1922).

[5] It would appear that the burden of proof as to these factors is on the plaintiff. There is as yet no known post-*Haslip* authority which allocates the burden of proof between the plaintiff and the defendant. Indeed, there may be none, even

*Note Well: Either plaintiff or defendant may produce evidence as to factors 1 through 10;*[6] *factors 11 and 12 are mitigating factors as to which only the defendant should be allowed to produce evidence.*

[(1) the [injury] [damage] which occurred from the defendant's conduct]

[(2) the [injury] [damage] which could have occurred from the defendant's conduct]

[(3) the degree of reprehensibility of the defendant's conduct]

[(4) the duration of the defendant's conduct]

[(5) the defendant's awareness of the nature and character of *his* conduct]

[(6) the defendant's awareness of the probable consequences of *his* conduct]

[(7) any concealment by the defendant of the facts or consequences of *his* conduct]

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though several of the factors could involve contested issues of fact which would seem to necessitate that the burden of proof be allocated.

Where the evidence as to the existence or non-existence of facts probative of a particular factor is in conflict, the trial judge may instruct the jury as follows: "The burden of proof as to facts which would support the existence of one or more of these factors is on the party trying to establish them. This means that such party must prove, by the greater weight of the evidence, the facts which support the existence of the factor(s) that party is trying to establish."

[6] Any reference to the "costs of litigation" as a factor has been intentionally omitted because of its potential to undermine North Carolina public policy.

[(8) the existence and frequency of any similar past conduct by the defendant]

[(9) whether or not the defendant profited from *his* conduct and, if so, whether that profit should be taken away]

[(10) the financial status or position of the defendant][7]

[(11) whether the defendant has already been punished, in whole or in part, by criminal sanctions]

[(12) whether the defendant has already been punished or is likely to be punished through other civil actions involving the same or similar conduct].

You may consider such other factors as arise logically and fairly from the evidence presented.

Finally, if you determine, in your discretion, to award punitive damages, then, considering those factors which are supported by the evidence, you may award to the plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the defendant, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant. That amount should be written in the space provided on the verdict sheet.

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[7] Evidence of the financial condition of the defendant is admissible. See *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 532 (1981), *modified*, 304 N.C. 696, 286 S.E.2d 99 (1982). But see *Pacific Mutual Life Insurance Co. v. Haslip, supra*, ___ U.S. at ___, 111 S.Ct. at 1045, 113 L.Ed.2d at 22. ("[T]he fact finder must be guided by more than the defendant's net worth.")

If, on the other hand, you determine, in your discretion, not to award the plaintiff any amount, then you should write the word "None" in the space provided on the verdict sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

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| | | |
|---|---|---|
| TUDOR ASSOCIATES, LTD., II, etc., | ) | |
| Plaintiff | ) | NO. 91-300-CIV-5 |
| VS. | ) | ISSUES |
| AJ AND AJ SERVICING, INC., et al., | ) | |
| Defendants | ) | |

1. Did the defendant, AJ and AJ Servicing, Inc., breach the contract it had with EMT of Ohio to which plaintiff, Tudor Associates, Ltd., II succeeded by virtue of the bankruptcy court's judgment of September 14, 1988:

A. By deducting from the revenues collected by it in its servicing of the wraparound mortgages management fees in excess of those authorized by the contract?

Yes ✓ No _

B. By deducting from such revenues reserves in excess of those authorized by the contract?

Yes ✓ No _

C. By deducting from such revenues attorney's fees not authorized by the contract?

Yes ✓ No _

D. By deducting from such revenues accounting fees not authorized by the contract?

Yes ✓ No _

If you have answered all of the foregoing questions "No", do not answer any of the remaining issues, but have your foreperson sign and date the verdict form and return to the courtroom.

If you have answered any of the foregoing questions "Yes", then proceed to answer all of the following numbered questions with their subdivisions.

2. A. Did the defendant, AJ and AJ Servicing, Inc., owe a fiduciary duty to EMT of Ohio under the contract to which plaintiff succeeded?

Yes ✓ No _

B. If so, did AJ and AJ Servicing, Inc. breach that duty?

Yes ✓ No _

3. A. Did either of the following defendants convert to their own use from the revenues collected under the contract with EMT of Ohio to which plaintiff succeeded money to which plaintiff was entitled under the contract?

AJ and AJ Servicing, Inc.: Yes ✓ No _
E. J. Realty Management Corporation: Yes ✓ No _
Garden National Properties, Inc.: Yes ✓ No _

B. If you have answered Issue No. 3A "Yes" as to any defendant, did the defendant as to whom you have

so found act with gross, willful, reckless or wanton disregard for the rights of the plaintiff?

AJ and AJ Servicing, Inc.: Yes ✓ No _
E. J. Realty Management Corporation: Yes ✓ No _
Garden National Properties, Inc.: Yes ✓ No _

4. Did the defendant, AJ and AJ Servicing, Inc., engage in any of the following practices or commit any of the following acts in its dealings with the plaintiff:

A. Did it attempt to conceal from the plaintiff revenues collected by it in servicing the wraparound mortgages to which plaintiff was entitled by depositing such revenues in various bank accounts under names of parties who bore no legal relationship to the plaintiff:

Yes ✓ No _

B. Did it file false and deceptive reports with the bankruptcy court?

Yes ✓ No _

C. Did it misrepresent to the trustee in bankruptcy, Mr. Callaway, his rights to revenues collected by AJ and AJ Servicing, Inc.?

Yes ✓ No _

D. Did it mislead or deceive the plaintiff as to the application of revenues collected?

Yes ✓ No _

E. Did it conceal from plaintiff the identity and ownership of the persons and corporations to whom management fees were being paid?

Yes ✓ No _

F. Did it falsely represent to the plaintiff that expenses for attorney and accounting fees were related to the operation of the properties?

Yes ✓ No _

G. Did it falsely represent to the plaintiff that additional management fees had been approved by the property owners?

Yes ✓ No _

If the answer to each of the foregoing questions is "No", proceed no further in your answers to this fourth issue. If your answer to any of these questions is "Yes", then answer this question:

H. Were the acts of defendant, AJ and AJ Servicing, Inc., committed in "commerce" or did these acts "affect commerce" as the court has defined these terms for you?

Yes ✓ No _

If your answer to "H" is "No", proceed no further in your answer to this fourth issue. If your answer is "Yes", then answer this question:

I. Were the acts of defendant, AJ and AJ Servicing, Inc. the proximate cause of injury or damage to the plaintiff?

Yes ✓ No _

5. A. Did either of the following defendants so dominate and control the acts and affairs of AJ and AJ

Servicing, Inc. in the manner outlined in the court's instructions as to require that the corporate entity be disregarded and its acts and affairs be deemed the individual acts and affairs of the defendant[s]?

Alan Jacobs: Yes _ No ✓
Robert Jacobs: Yes ✓ No _

If your answer as to both defendants is "No", proceed no further but sign, date and return the verdict form to the courtroom. If your answer as to either defendant is "Yes", then answer the following two questions:

B. Was the domination and control of the corporation used to perpetrate a violation of plaintiff's rights?

Yes ✓ No _

C. If so, did such breach of plaintiff's rights proximately cause injury or damage to the plaintiff?

Yes ✓ No _

/s/ Amy Guy
Foreperson

June 15, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

| | | |
|---|---|---|
| TUDOR ASSOCIATES, LTD., II, etc., | ) | |
| Plaintiff | ) | NO. 91-300-CIV-5 |
| VS. | ) | VERDICT ON DAMAGES |
| AJ AND AJ SERVICING, INC., et al., | ) | |
| Defendants | ) | |

Having answered the five issues on liability previously submitted to us in favor of the plaintiff, we, the jury, now answer the issues on damages submitted to us as follows:

6. What is the total amount of damages plaintiff is entitled to recover for the period September 14, 1988 through March 31, 1991 from defendants AJ and AJ Servicing, Inc. and Robert Jacobs arising from payments made on the New British Woods Associates and New Yorktown Associates mortgages?

$ 430,453.50

7. What is the total amount of damages plaintiff is entitled to recover for the period September 14, 1988 through August 31, 1991 from defendants AJ and AJ Servicing, Inc. and Robert Jacobs arising from payments made on the mortgages on the two motel properties?

$ 99,243

8. What portion of plaintiff's total damages, if any, set forth in answer to questions 6 and 7 was also caused by the conversion of defendant E. J. Realty Management Corporation as management fees?

$ 227,985

9. What portion of plaintiff's total damages, if any, set forth in answer to questions 6 and 7 was also caused by the conversion of defendant Garden National Properties, Inc. as management fees?

$ 56,996

10. What amount of punitive damages, if any, is the plaintiff entitled to recover in the discretion of the jury of the defendants Robert Jacobs and AJ and AJ Servicing, Inc.?

$ 7 million

/s/ Amy M. Guy
Forelady

June 24, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

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| | |
|---|---|
| TUDOR ASSOCIATES, LTD., II, a Nebraska limited partnership, by and through its Trustee, JOSEPH N. CALLAWAY,<br><br>Plaintiff<br><br>VS.<br><br>AJ AND AJ SERVICING, INC., a New Jersey Corporation, E. J. REALTY MANAGEMENT CORPORATION, a New Jersey Corporation, GARDEN NATIONAL PROPERTIES, INC., a New Jersey Corporation, ALAN JACOBS and ROBERT JACOBS,<br><br>Defendants | NO. 91-300-CIV-5<br><br>SUPPLEMENTARY JUDGMENT |

In the original judgment filed in this action on June 25, 1993 following rendition of the jury verdict in favor of plaintiff plaintiff was required to make an election as to whether he would accept the jury verdict on his Fair Trade Act cause of action or the jury verdict awarding him $7,000,000.00 in punitive damages against two of the defendants, AJ and Robert Jacobs. Plaintiff elected to accept the punitive damages verdict. Thereafter the defendants filed a motion for judgment as a matter of law notwithstanding the verdict as to each of plaintiff's four causes of action and in the alternative for a new trial as to

all issues. The court's rulings on the questions raised by defendants' motion are incorporated in a memorandum of decision filed today on the basis of which it is now

ORDERED, ADJUDGED AND DECREED:

1. The provisions of the original judgment filed June 25, 1993 are reconfirmed, and the money judgment rendered against the defendants therein shall bear interest at the legal rate from June 25, 1993 until paid.

2. Defendants' motion for judgment as a matter of law as to plaintiff's cause of action based on contract is denied.

3. Defendants' motion for judgment as a matter of law as to plaintiff's cause of action based on breach of fiduciary duty is allowed, and that cause of action is dismissed.

4. Defendants' motion for judgment as a matter of law as to plaintiff's cause of action based on the North Carolina Fair Trade Act is allowed, and that cause of action is dismissed.

5. Defendants' motion for judgment as a matter of law on plaintiff's cause of action based on conversion is allowed, and that cause of action is dismissed. Plaintiff's claim for punitive damages having been dependent upon the successful prosecution by plaintiff of his cause of action based on conversion, is likewise dismissed, and the jury's award of punitive damages to the plaintiff is set aside.

6. Defendants' motion to have the damages award reduced by the sum of $60,597.50 is denied.

7. Defendants' motion to have the damages award reduced by the sum of $80,300.00 is denied, but in the event plaintiff recovers the identifiable sum of $80,300.00 from the state court escrow fund admittedly due the plaintiff (see the original judgment), the judgment in this action shall be credited with the same amount in order to avoid a double recovery by the plaintiff.

8. Since the evidence supported the jury's verdict in favor of the plaintiff on his cause of action based on contract, defendants' motion for a new trial on that cause of action is denied.

9. Should it be held on appeal that the court was in error in dismissing the cause of action based on breach of fiduciary duty, defendants' alternative motion for a new trial on this cause of action is denied.

10. Should it be held on appeal that the court was in error in dismissing the cause of action based on the North Carolina Fair Trade Act, defendants' alternative motion for a new trial on this cause of action is denied.

11. Should it be held on appeal that the court was in error in dismissing the cause of action based on conversion, defendants' alternative motion for a new trial on that cause of action is denied.

12. Should it be held on appeal that the court was in error in dismissing plaintiff's claim for punitive damages, for the reasons stated in the court's memorandum of decision the jury's award of $7,000,000.00 in punitive damages is set aside as grossly excessive and contrary to law, and defendants are granted a new trial on this issue.

Let the defendants pay the costs of the action to be taxed.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES
DISTRICT JUDGE

September 7, 1993.